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Utah Court of Appeals

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Utah State Prison
P.O. Box 250
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APPELLATE COURTS
POSTMARKED

OCT 3 1 2016

IN THE UTAH COURT OF APPEALS

Kurtis Andersen, Petitioner and Appellant V. SCOTT CROWTHER, Warden, Utah State Prison, et al., Defendant and Appellee	Appeal of Summary Judgment Appellate Case No. 20160676-CA District Court No. 150906553

Petitioner, Kurtis Andersen, in the above-entitled manner, appeals to the Utah Court of Appeals from the final Summary Judgment entered in this action on, June 8, 2016.

20160676

Kurtis Andersen, 23131
Utah State Prison
P.O. Box 250
Draper UT 84020
Pro se

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BRIEF OF APPELLANT

Statement of Subject Matter and Appellate Jurisdiction

The complaint raises a question whether the defendants violated the petitioners rights under the Utah State Constitution and the United States Constitution. This court has appellate jurisdiction, Utah Code Ann. § 78A-4-103, as this case was assigned to the Court of Appeals on September 12, 2016. The grant of Summary Judgment to the defendants is a final judgment.

Statement of Issues Presented for Review

1. Whether the district court in granting summary judgment improperly decided disputed factual issues.
2. Whether the petitioners factual allegations raised a materi issue under the Fourteenth Amendment.
3. Whether the district court in granting summary judgment improperly denied the petitioner the opprotunity to present exculpator evidence, evidence that is in the exclusive control of the defendant.

Statement of the Case

A. Statement of the Proceedings

This is a civil rights action under Utah Rules of Civil Procedur Rule 65(B), Petition for Extraordinary Relief. The district court granted summary judgement to the defendant on the grounds that

the only material issue was the events of a single day, that of March 6, 2015, when the defendant claims the petitioner identified himself as a different Anderson and did receive the other persons medication, on that day.

B. Statement of Facts

1. The petitioner alleged in a affidavit under the penalty of perjury that the defendants did give him, at the regular Lone Peak pill line distribution, the medicine that showed a positive on a urinalysis test on February 19, 2015, see addendum 1, Motion to Deny Respondents Summary Judgment, pg. 3, Disputed Facts, number 5, and that the prison did give him the wrong medication, that of a different person named Anderson, (different first name, different last name spelling, 'son') for a period of more than, "a month and a week," approximately January 27, 2015 to March 6, 2015. See addendum 2, 65(B) Petition, Brief History Section, pg. 1-3, numbers 1, 2, 3 and 4.

2. The defendants issued two disciplinary MD-1 write-ups to the petitioner. The first, written on March 6, 2015, had two charges. The first charge was an A13, intoxicant/controlled substance, issued for the alleged, "pretending to be" a different Anderson (1) and that "this has apparently been going on for quite a while." The second charge was a B05, forgery/fraud/embezzlement/theft/nsf, issued for the same alleged "pretending". See 65(B) Petition, Exhibit Ex, 1-A, 1-B, addendum 3. The second, one charge, A-13, March 8.

3. These write-ups were served on the petitioner on March 30,

(1) Footnote 1, see pg. 14.

2015.

4. On May 6, 2015 the prison conducted a disciplinary hearing on the write-ups. Petitioner plead not guilty to all three charges. Petitioner alleged in an affidavit under the penalty of perjury that he requested "witnesses be called from Lone Peak, visual camera evidence be viewed and written records be looked at." Petitioner alleged that the camera images would "show the prison giving him the medication that resulted in the positive U.A. of February 19, 2015," as well as "giving him the wrong Anderson's medicine for over one month and one week," that from January 27, 2015, to March 6, 2015. See again addendum number 1. The hearing officer has never, in regards to these two write-ups, explained his decision to not allow the petitioner to be able to use the witness testimony, video image evidence or the written documents in his defense. See addendum 4, summary judgment ruling, pg. 3, number 9.

5. On May 8, 2015, the hearing officer dismissed without prejudice the two charges in the first write-up and found the petitioner guilty on the charge of the second write-up, the positive U.A.

6. On July 9, 2015, the Board of Pardons (the Board) rescinded the petitioners October 3, 2017 parole date, added six more months time of incarceration with a new date of April 3, 2018, and made the extended date contingent on the petitioner successfully completing the 'Conquest' treatment program.

The rescission hearing would not have occured without the prison submitting a "rescission request" and that could not have occured without the guilty finding of the A13 charge of the

of the second write-up.

Nowhere in its summary judgment ruling does the district court address the petitioners factual allegations concerning this second write-up.

7. On July 10, 2015, the prison re-filed the two charges of the first write-up written on March 6, 2015 that had been dismissed without prejudice at the May 8, 2015 decision.

The two charges were A13 again and a B08 interfer w/ investigation, false statements / ID.(2) This write-up was re-worded and re-written to eliminate the language of "going on for a while" to narrow the focus down to include only one day, that of March 6, 2015. Petitioner was served this write-up on July 23, 2015. See addendum 5, 65(B) Petition, Exhibit 16, EX-16 A.

8. Petitioner factually alleged that he again asked for witnesses, have video images reviewed and have the rest of the written records be viewed. These records requested included the entire distribution history of the other Anderson's medicine distribution. See addendum 6, Memorandum in Support of Petitioners Original 65(B) Petition, pg. 1-2, marks 1, 5, 6, and 8.

9. On September 14, 2015 the hearing officer found the petitioner guilty on both charges. The reason listed was statements of prison staff medical technician Mook and officer Demers. See addendum 7, Memorandum in Support, Exhibit Ex 21, A. He found this to be 'some evidence' of guilt. See Howard V. U.S. Bureau of Prisons, 487 F.3d 808, 814, (10th Cir. 2007) (The Bureau noted that the DHO based his decision on staff

(2) Footnote 2, see pg. 14.

reports and argued that, because "[p]rison staff are legally obligated to tell the truth in disciplinary proceedings," introducing "any possible videotape would have been needlessly cumulative." This Orwellian argument would neatly dispose of any need to allow inmates to present evidence contradicting statements of prison staff, a conclusion we are not prepared to accept).

The disciplinary officer references the "rate of pill usage of Jason's medication"... "in the blister pack". See addendum 7.

Of note: Although the defendant have granted themselves the use of the other Anderson's medication distribution history, albeit a narrow partial piece of it, they have consistenly denied the petitioner the use of those same records in his defense by stating that, "it would violate that inmate's privacy rights."

The petitioner was given permission by the other Anderson, via a verified document to use his medical distribution history. Due to the difficulty being able to contact him the petitioner was [redacted] unable to receive this permission until after the summary judgment being granted to the defendants. See addendum 8, letter of permission.

This difficulty was such that petitioner, in a Motion to Compel Discovery from Defendants, filed on May 25, 2016, asked the court to enjoin the defendant to allow him to be able to ask the other Anderson permission to use his medicine history. See addendum 9, Motion to Compel Discovery from Defendants, pg. 3, number 6. This Motion to Compel was denied by the district court in a footnote on the summary judgment ruling. See addendum 10,

Summary Judgment ruling, pg. 12, footnote 7.

10 The petitioner alleged that this "rate of pill usage" was only a partial piece of the distribution history of the other Anderson and did not show "the whole pattern changes" that supported his allegations. The "blister pack" is only a two week period of time. See addendum 6

11 The disciplinary officer stated that "there was no available camera recording of pill line made by Security Electronics staff, Lone Peak Staff or by anyone if the Shift Commander's office. See addendum 7, Memorandum in support of Petitioners original 65(B) Petition, Exhibit EX--21, A.

12 Jay Phelps, an Electronic Tech/Journeyman officer at the Utah state prison testified that the camera's in question are on two different DVR systems and store video recordings for 15 or 18 days.

He does not state what is done with the recordings after that time frame is up, nor does any other prison staff.

He also testified that, "there are presently no video recordings from Lone Peak" for the relevant dates, Underline emphasis added. See addendum 11, Phelps Declaration, pg. 2, number 11.

13 The district court erred when quoting the testimony of Jay Phelps. It quoted Phelps as testifying that "no recordings presently exist from the subject dates." The exact wording is, "there are presently no video recordings from...". Underline emphasis added. See addendum 12, summary judgment ruling, pg. 5, number 19.

The above, number 11 and 12, are the only two documented

responses by prison personnel in regards to the video images for Lone Peak of the subject times and the factual allegations of the petitioner concerning what those images show. Nowhere is there any verified document from the defendant Warden Scott Crowther or any other prison personnel that the video evidence was in fact destroyed and no longer exists. The burden of that proof of the existance of evidence in its sole control is that of the defendant. See Howard V. U.S. Bureau of Prisons, 487 F.3d 808, 81. 814 Court of Appeals, (10th Cir. 2007), (the full case is in addendum 15)

[redacted] (In addition to his requsted witness testimony, Mr. Howard requested that the DHO review videotape records from a camera which was allegedly sited atop a neighboring building.[3] This plea merely reiterated a request Mr. Howard had consistently made before, one he clearly expected would bolster his argument that he had in fact acted in self-defense. The*814 Bureau has never asserted, and the record before us does not support, a conclusion that producing the videotape alleged by Mr. Howard to have recorded the incident would be "unduly hazardous to institutional safety or correctional goals." Wolff, 418 U.S. at 566, 94 S. Ct. 2963. The DHO's unjustified refusal to produce and review it deprived Mr. Howard of the process due him.

The Bureau, responding to the district court's show-cause order, raised two arguments. It asserted, first, that Mr. Howard had failed to demonstrate that any videotape documenting the incident existed, and second, that in any event its presentation would be "needlessly cumulative." As to the Bureau's first

point, we note both that the Bureau has carefully refrained from denying that any videotape exists and that the proof of this is solely within its control. We are unconvinced, given Mr. Howard's specific allegations of self-defense and exculpatory videotape evidence in the government's exclusive possession, that Mr. Howard failed to carry whatever burden he may have had at that stage of the proceedings.[4]

[4] In this connection, we note that at least one other circuit has vigorously enforced a long-standing rule requiring government disclosure of exculpatory evidence [redacted] in Prison disciplinary proceedings, unless that disclosure would unduly threaten institutional concerns." Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992); See Chavis v. Rowe, 643 F.2d 1281, 1285-86 (7th Cir. 1981) (holding that officials' failure to disclose materially exculpatory evidence in a prison disciplinary proceeding violates the inmate's due process rights and is not harmless error); See also 60 AM. JUR. 2d Penal & Corr. Insts. § 143 (noting that "depriving a prisoner [of] an opportunity to present exculpatory evidence" violates due process, citing Chavis). Underline emphasis added.

14. The district court also erred in its statement concerning the "No ID was required" issue. In its ruling, (see addendum 13, Summary Judgment ruling, Discussion section, pg. 7) the Court states, "Indeed, the hearing officer's Disciplinary Findings from the August 28 Hearing make clear that he already understood that no ID was required in the pill line. Thus,

the only disclosed issue on which Petitioner wanted to have witnesses testify was not in dispute at the disciplinary hearings and, therefore, the testimony would have been cumulative and unnecessary. Accordingly, the hearing officers decision to decline Petitioners invitation to call witnesses did not deprive Petitioner of due process."

There is no mention of the disciplinary officer agreeing with the fact that "NO ID was required in pill line" in his Disciplinary Findings Form, the document that explains his findings, See addendum 7, and is what the court refered to.

The petitioner cannot find in any prison documents any statements that declare the disciplinary officer understood and acknowledged that no ID was required. If the disciplinary officer would have acknowledged that fact it would seem that he would have understood how those conditions of the prisons medicine distribution routine would have easily led to the mistakes that the petitioner factually alleged happened.

Summary of Argument

The petitioners affidavit squarely contradicted the factual allegations of the defendants. The affidavit also put forth additional factual allegations that were unanswered by either the defendant or the Court. These unanswered allegations concern the U.A. issue which resulted in the petitioner having to, "spend more time in prison." That is a circumstance that the

petitioner has a liberty interest in. See Sandin V. Conner, 515 U.S. at 484. (Prisoners should only be found to have liberty interests in three circumstances; (1) when the right at issue is independently protected by the Constitution, (2) when the challenged action causes the prisoner to spend more time in prison, or (3) when the action imposes "atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life). Underline emphasis added.

Petitioner was denied the chance to use evidence that he factually alleged would exonerate him, evidence in the exclusive control of the prison.

Petitioners affidavit and the facts it alleged would have supported a judgment for the petitioner under the Fourteenth Amendment. Summary judgment was therefore improper on the record before the district court.

Standard of Review

Whether a party is entitled to summary judgment is a question of law over which this court exercises plenary review. Noonan V. Staples Inc., 539 F.3d 1,5 (1st Cir. 2008); Kaucher V. County of Bucks, 455 F.3d 418, 422 (3rd Cir. 2006).

Argument

Point I

The District Court Should Not Have Granted Summary Judgment Based On Its Resolution Of Disputed Facts

Summary judgment is to be granted only if the record before the court shows "that there is no genuine dispute as to any material facts and that the moving party is entitled to judgment as a matter of law." Rule 56(a), Utah R. Civ. P. and Rule 56(c), Fed. R. Civ. P.

The petitioners affidavit squarely contradicts the defendants story concerning how he identified himself before receiving medication. It also explains and shows the reason of the U.A. result. Neither the defendant, nor the court, has challenged or answered these U.A. allegations.

The district courts statement that "petitioner has failed to demonstrate that the requested video recording would have provided any material evidence in his underlying disciplinary proceedings" and that "the only material and disputed issue" was the events of only one day, that of March 6, 2015, amounts to a judgment about the credibility of the petitioners allegations. Allegations that include the defendant giving the petitioner the medicine in regards to the U.A. as well as the continuing negligent pattern of giving the petitioner the wrong Anderson's medicine for an extended period of time. Wether the defendant nor the court can know what is on the video images without viewing them.

The district court may not make credibility determinations or otherwise resolve disputed factual issues on a motion for summary judgment. Jenkins V. Winter, 540 F.3d 742, 750 (8th Cir. 2008); Washington V. Haupert, 481 F.3d 543, 550 (7th Cir. 2007),

Point II

The Petitioner's Factual Allegations Raise A Material Issue Under The Fourteenth Amendment

A "material" fact is one that "might affect the outcome of the suit under governing law." Anderson V. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986).

The disputed facts alleged by the petitioner are material and relevant. His affidavit portrays a negligent pattern of medicine distribution which resulted in his receiving a medicine that showed on a urinalysis and resulted in his receiving another inmates medication, not just once as the prison alleged, but for over a month. The facts alleged by the petitioner are evidence that the defendants were acting negligently. See Rule 401, Utah Rules of Evidence; Relevant if: (a) it has a tendancy to make a fact more or less probable than it would be without the evidence.

Point III

The District Court's Granting of Summary Judgment Prevented The Petitioner From Being Able To Obtain Exculpatory Evidence.

The "district court inappropriately granted summary judgment without allowing the plaintiff the discovery he had been seeking." Jonas V. Blanas, 393 F.3d 918, 930-31 (9th Cir. 2004). By granting summary judgment to the defendants, the district court has

denied the petitioner the opportunity to procure and present evidence he has consistently alleged is exculpatory and completely supports his factual allegations.

LaBounty V. Coughlin, 137 F.3d 68, 71-72 (2d Cir. 1998) (holding district court should not have granted summary judgment to defendants when his ability to provide certain evidence [redacted] allegedly resulted from defendants' failure to respond to discovery)

There has been no response from the defendants through:
request for discovery, filed March 23, 2016;
Second request for discovery, filed March 29, 2016;
* interrogatory questions, filed April 27, 2016;
admissions, submitted to defendant, June 20, 2016;
Compel to discover, filed May 25, 2016.

* McLeod, Alexander, Powell & Apffel, P.C. V. Quaries, 894 F.2d 1482, 1485 (5th Cir. 1990) (same; standard equally applicable to interrogatories and document requests). See Gorey V. Fraternal Order of the Eagles Aerie No 2742, 2005 UT App. 185, 524 Utah Adv. Rep 112 P.3d 1244. This rule allows a court to impose sanctions against a party for disregarding discovery obligations even when that party has not violated a court order specifically compelling discovery.

Defendants have failed to respond to any of the above referanced items in the time frames required by the Utah Rules of Civil Proceedures. This amounts to the obstruction of the normal judicial process and is therefore liable for sanctions. See WWtWB Gardner Inc. V. Village Inc., 568 P.2d 734 (Utah 1977) (the sanction for defalt judgment for failure to make discovery is justified where there has

been a frustration of the judicial process); see also, Tuck V. Godfrey, 127, 991 P.2d 407 (Ut. App. 1999)(finding that the defendant had obstructed discovery supported courts deasion to impose default as a discovery sanction).

Conclusion

For the foregoing reasons, the grant of summary judgment should be reversed and default judgment should be granted to the petitioner or; the grant of summary judgment and the Compel to Discover ruling should be reversed and remand back to the district court accompanied with the order to defendants to comply with the Compel to Discovery Motion and answer the interrogatories and addmissions.

—Footnotes 1 and 2: petitioner factually alleged under the penalty of perjury that he "has never identified himself as Jason Lynn Anderson." See addendum 2, 65(B) Petition, Brief History Section, Pg. 4, Top of page.

Petitioner, Kurtis Andersen, swears under the penalty of perjury that the aforegoing Appeal of Summary Judgment is true and accurate.

Date:
September 29, 2016

Kurtis Andersen

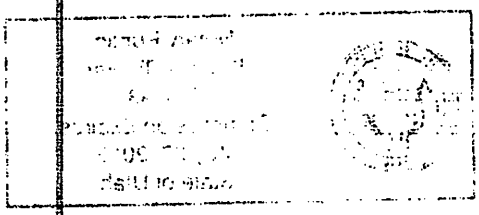
State of Utah)
County of Sevier)

On this 29 day of Sept in the year 2016, before me K Tucker
a notary public, personally appeared Kurtis Andersen
proved on the basis of satisfactory evidence to be the person(s) whose name(s) (is/are) subscribed to this instrument, and acknowledged (he/she/they) executed the same. Witness my hand and official seal.

NOTARY PUBLIC

SEAL

Notary Public
Kevin A. Tucker
683193
Commission Expires
May 27, 2019
State of Utah



Certificate of Service

Petitioner, Kurtis Andersen, declares that a true and accurate copy of the aforegoing Appeal of Summary Judgment [redacted] was mailed to the Contract Attorney's office to be copied.

Date: September 29, 2016

Kurtis Andersen

State of Utah)
County of Salt Lake)

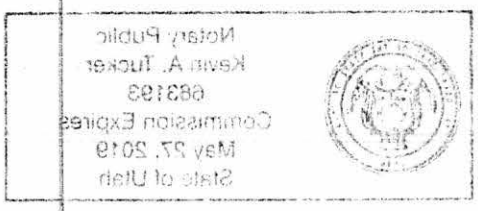
On this 29 day of Sept in the year 2016 before me Kevin A. Tucker, a notary public, personally appeared Kurtis Andersen, proved on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to this instrument, and acknowledged (he/she/they) executed the same. Witness my hand and official seal.

NOTARY PUBLIC

SEAL

Notary Public
Kevin A. Tucker
683193
Commission Expires
May 27, 2019
State of Utah

[redacted]


Notary Public
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1

Addendums

Due to the extremely large numbers of pages that have been produced in these proceedings, petitioner has used in his addendums only the pages referenced rather than submitting the entire content of each Motion, Memorandum, etc..

Petitioner certifies under penalty of perjury that all the addendum pages, in their accompanying documents, have been filed with the district court and are on record, except addendum 8, the letter of permission from the other Anderson.

Date: September 29, 2016.

Kurtis Anderson

State of Utah)
County of [illegible])
On this [illegible] day of [illegible] in the year [illegible] before me [illegible]
a notary public, personally appeared [illegible]
proved on the basis of satisfactory evidence to be the person(s) whose name(s) (is/are) subscribed to this instrument, and acknowledged (he/she/they) executed the same. Witness my hand and official seal.

NOTARY PUBLIC

SEAL

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Addendum 1

Motion to Deny Respondents Summary Judgment,

Pg. 3, Disputed Facts, number 5.

Disputed Facts

1. Yes, Petitioner is an Inmate presently incarcerated.
2. Petitioner did plead guilty to having extra pills from his prior blister packs on June 6, 2012. However, this has no bearing on this present Petition and is therefore not appropriate for Summary Judgment. See exhibit 1.
3. On October 18, 2013, Petitioner did not plead guilty to A-13 Intoxicant/ Controlled substance as Counsel for the Defendants claims. Petitioner plead guilty to C-07 possession of contraband. That 'Guilty' plea was disregarded by the DHO. Petitioner was consequently 'found' guilty of the A-13 charge and found 'not guilty' of the C-07 charge despite the fact that he plead guilty to it. The DHO disregarded a person's admitted guilty plea in favor of doing what she wanted. This was done as an A-13 charge carries significantly more punishment than a C-07 charge. Even so, number three has no bearing on the present Petition and is therefore not appropriate for Summary Judgment. See exhibit 2.
4. See number eight. (8) Petitioner will combine numbers (4)(8)(9)(10) as they have bearing on one another.
5. On May 6, 2015, at a Disciplinary Hearing, Petitioner plead Not Guilty to an A-13 Intoxicant/controlled substance write-up, written on March 8, 2015, that was based on a positive test for Tramadol on a U.A., on February 19, 2015. Petitioner was found guilty despite the fact that he asked for evidence to be examined that would conclusively prove the medical personnel at the prison gave Petitioner medication, negligently, that showed on the test: i.e. irrefutable camera evidence, witnesses asked for, (which Petitioner told DHO Young to pick anyone, and as many as he wanted, anyone that had [redacted] received pills at Lone Peak pill line during the time he was there) witnesses which will testify to not having to show ID before receiving medication, and the medication distribution history record of Jason Anderson, 130870. Petitioner also asked DHO Young to consider the inaccurate and false statements made by Med-Tech Mark Mook and Officer Demer's reports on

Addendum 2

65(B) Petition, Brief History section, Pg. 1-3, numbers 1, 2, 3, and 4.

- Footnotes 1 and 2, 65(B) Petition, Brief History Section, Pg. 4, Top of page.

Brief History

1.– Jan. 26, 2015, on or about, I saw Physician Assistant Ramond Merrill about a fungal problem and a back issue. I was prescribed medicines and a special cream. This was not a simple athletes foot problem. This was deep into the skin and nails. The strength of the medicines was such that regular blood tests were required to monitor liver enzyme levels. I began receiving medication twice a day at pill line as well as received blister packs and the cream. The medicine distribution record shows all medicines for Kurtis Andersen, # 23131. The camera recordings will show Kurtis Andersen receiving medicine at every pill line, twice each day.

2.– Feb. 11, 2015, on or about, I went to the dentist, was prescribed more medicines which the written records show. Camera recordings will show the <u>same medication continuing</u> to be received from retained blister pack and will also show me <u>receiving the additional medicines</u> from the dentist. These were strong pain medicines that have extra precaution taken with them. I will be shown receiving pills to swallow and given a container containing an additional dose for later. That container has the <u>Inmates</u> [redacted] <u>name and number written on it.</u> It is clear plastic see through. Every pill line the person receives a new container due to the extra caution needed. These extra pills stopped after P.M. pill line on or about Feb. 15, 2015.

3.— Feb. 19, 2015, on or about, I had to go back to the dentist for additional work and was again prescribed pain medicine that called for the extra precaution measures. The written records show this and the camera recordings will show the same sequence of pills being given to me. The normal pill, plus the container pills swallowed, and then the container itself with the later dose, with my name and number printed on it. Before, during, and after this time frame I was still receiving the pill from the retained pack that I thought was for my fungal condition, which I now understand was not medicine that had been prescribed to me.

I continued to receive this pill from the med-tech's retained medicine bin, from the med-tech's, until Mar. 06, 2015.

4.— Mar. 06, 2015, on or about.— Med-tech Mark Mook has a characteristic in doing his job (he is the only med-tech that does this) that after all Inmates have gone through pill line, he will call the names of any who have remaining medications that haven't been picked up yet. On Mar. 06 he called my name, Kurtis Andersen, so I went and got my blister pack and went to get the new one. This was for Ibuprofen. I handed the blister pack to med-tech Mark Mook. He looked at it and said, "Whats this?" I said, "Thats my blister pack." He said, "I thought your name was Jason Lynn." I replied, "No, I am Kurtis, Kurtis Andersen." He said, "You've been getting Jason Anderson's pills." I replied, "No, I've been getting my pills, pills that I've been getting almost [redacted] the whole time I've been here. I get

them twice a day." He got this look on his face and then became angry and told me, "Just get out of here." I learned a long time ago that when a prison official says to do something, especially when they're mad, you do it immediately. So I picked up my empty blister pack that he had thrown down on the desk and I left. I did not receive the pill that I had been getting, twice a day, ever again. The next pill line I was told there was no pills for me. Thats when I figured out that I had been getting the wrong medicine the whole time.

5. - From the moment I left the med room on that Mar. 06, 2015, efforts have been made to cover-up that mistake, a mistake that they never would have made if they had required Inmate I.D. when giving medication. The very next day everyone suddenly had to show I.D. at pill line. The camera recordings will show this, as will witness testimony. As will any memo's of the D.O.C., medical department, issued around that time. Memo's that Inmates are not allowed to see.

Some Additional History

6. - Aug. 13, 2015, on or about, petitioner finally received a partial first report, from a Grama request on officer Demers report concerning the original write-ups. This report gives an inaccurate account of the events on March 06, 2015. Petitioners testimony of those events can be found in paragraph four (4) in this Brief History Section of the petition.

Of note in regards to this partial report: In the Incident

Paragraph - petitioner has never identified himself as Jason Lynn Anderson. The exchange of blister packs happened several times at Lone Peak, everytime a refill was needed, while receiving the medication from the med-tech's retained medicine bin.
In the Actions paragraph - Demers states he and Mark Mook had a conversation to decide what had happened. They appear to have decided that of instead of admitting thay they made a mistake (the med-tech's) that it was obviously the Inmate Andersen's fault for 'pretending' to be a different Anderson.
In the Interviews paragraph - Med-tech Mook did not ask why petitioner was trying to exchange a blister pack.... He said, "whats this?" The statement that "Inmate Andersen failed to reply and quickly left with his blister (empty) pack," is false. Paragraph four (4) of this Brief History section accurately states the verbal exchange. See exhibit (3).

7.- Aug. 13, 2015, on or about, petitioner received a partial report from a Grama request, on Demers 'supplemental' report asked for by Ronald Wilson. That report states that med-tech Mook, "verified that he had indeed given the pills for Anderson, Jason, to Inmate Andersen, Kurtis, on 03/06/2015." This admitted illegal distribution of medication happened not only on 03/06/2015 but over the course of more than a month, as the camera evidence will show. Not only Mook, but other med-tech's as well. Mook also confirms this by his M-track nursing notes report and by the first write-up itself, which states, "and this has apparently been going on for a while as it caused...".

Addendum 3

65(B) Petition, Exhibits Ex1-A, and 1-B.

Utah Department of Corrections

Incident Case # 295699

ISCIPLINARY MD-1 FORM Class MAJOR **UDC Discipline Case # 690151**

ast Name	First	Middle	Offender # / USP #
NDERSEN	KURTIS	ROSS	23131 / 42747

ate and Time Occurred	Incident Location
3/06/2015 18:20 to 03/06/2015 18:25	LONE PEAK - Lone Peak Correctional Facility Medical Room

XPLAIN CHARGES

A13 INTOXICANT/CONTROLLED SUBSTANCE

Inmate Andersen, Kurtis, #23131, pretended to be Inmate Anderson, Jason Lynn, #130870, in order to obtain Inmate Anderson, Jason Lynn's medication from medical staff. This has apparently been going on for a while as it caused Inmate Andersen, Kurtis, #23131 to test positive for both opiates and tramidol, neither of which he is prescribed, on a recent UA. Last updated - 03/07/2015

B05 FORGERY/FRAUD/EMBEZZLEMENT/THEFT/NSF

Inmate Andersen, Kurtis, #23131, pretended to be Inmate Anderson, Jason Lynn, #130870, in order to obtain Inmate Anderson, Jason Lynn's medication from medical staff. This has apparently been going on for a while as it caused Inmate Andersen, Kurtis, #23131 to test positive for both opiates and tramidol, neither of which he is prescribed, on a recent UA. Last updated - 03/07/2015

Opiates prescribed by dentist.

eporting Officer	Electronic Verification	Date
EREMY DEMERS	*Jeremy Demers*	03/06/2015

☐ Restitution Requested From Damage Report	Amount	NOTICE: OTHER RESTITUTION MAY BE ASSESSED WHICH WAS NOT CALCULATED PRIOR TO YOUR HEARING.

creening Supervisor	Electronic Verification	Date
EVIN LARSEN	*Kevin Larsen*	03/10/2015

NSTRUCTIONS FOR OFFENDERS CHARGED WITH MAJOR DISCIPLINARY OFFENSES

You have been charged with a violation of rules, regulations or other conduct standards.
Major violations entitle you to a due process hearing.

a. Your case will be heard by a Hearing Officer no sooner than 24 hours after service unless waived.
b. You are not entitled to an attorney. The Hearing Officer can provide a counsel substitute for offenders found incompetent to offer a defense.
c. You may request to call witnesses who can offer relevant material, competent testimony. The Hearing Officer will rule on the witness request.
d. You do not have the right to cross-examine adverse witnesses nor confront accusers if, in the opinion of the Hearing Officer, it would jeopardize the safety of other offenders or staff, security or operational goals. For the same reason, the Hearing Officer may determine it necessary to take some testimony outside your presence.
e. You may be compelled to answer questions at the hearing. Failure to answer may result in the Hearing Officer making an adverse inference from your silence. If criminal charges are contemplated, you will be notified.
f. If you wish to appeal the decision in this matter, you may do so by completing the Disciplinary Appeal Form within 20 days after receiving a copy of the MD-2. Your appeal must specifically allege that: (1) required disciplinary procedures were not followed; (2) there was not some evidence to support the Hearing Officer findings; or (3) the disciplinary sanctions were clearly excessive.

Minor offenses do not require a due process hearing or an appeals process.
Based on the findings of the Disciplinary Hearing Officer you may be assessed all, part or none of the total restitution amount as listed above.

ISTRUCTIONS FOR SERVING OFFICER

Hand the offender one copy of the MD-1 with a damage report if restitution is requested.
Enter the date served in O-track.

fficer Certifying Personal Service	Date and Time Served
Ronald Wilson	03/30/2015 08:00

EX-1-B

Utah Department of Corrections

UDC GRAMA Classified Private

DISCIPLINARY MD-1 FORM Class MAJOR

Incident Case # 295703
UDC Discipline Case # 690180

Last Name	First	Middle	Offender # / USP #
ANDERSEN	KURTIS	ROSS	23131 / 42747

Date and Time Occurred	Incident Location
02/19/2015 19:03 00/00/0000 00:00	LONE PEAK - Lone Peak

EXPLAIN CHARGES

A13 INTOXICANT/CONTROLLED SUBSTANCE

On February 19, 2015 at 1850 hours, I requested a urine sample from Inmate Andersen for drug testing. At 1903 hours I collected the sample from Inmate Anderson. After collecting Inmate Anderson's sample I verified it was his name and offender number on the UA cup and I sealed it. The sample came back positive for Tramadol 2511/200 with a retest of 2415/200. Last updated - 03/13/2015

Reporting Officer	Electronic Verification	Date
BRITTAN PETERSEN	*Brittan Petersen*	03/08/2015

☐ Restitution Requested From Damage Report	Amount	NOTICE: OTHER RESTITUTION MAY BE ASSESSED WHICH WAS NOT CALCULATED PRIOR TO YOUR HEARING.

Screening Supervisor	Electronic Verification	Date
KEVIN LARSEN	*Kevin Larsen*	03/15/2015

INSTRUCTIONS FOR OFFENDERS CHARGED WITH MAJOR DISCIPLINARY OFFENSES

1. You have been charged with a violation of rules, regulations or other conduct standards.
2. Major violations entitle you to a due process hearing.
   a. Your case will be heard by a Hearing Officer no sooner than 24 hours after service unless waived.
   b. You are not entitled to an attorney. The Hearing Officer can provide a counsel substitute for offenders found incompetent to offer a defense.
   c. You may request to call witnesses who can offer relevant material, competent testimony. The Hearing Officer will rule on the witness request.
   d. You do not have the right to cross-examine adverse witnesses nor confront accusers if, in the opinion of the Hearing Officer, it would jeopardize the safety of other offenders or staff, security or operational goals. For the same reason, the Hearing Officer may determine it necessary to take some testimony outside your presence.
   e. You may be compelled to answer questions at the hearing. Failure to answer may result in the Hearing Officer making an adverse inference from your silence. If criminal charges are contemplated, you will be notified.
   f. If you wish to appeal the decision in this matter, you may do so by completing the Disciplinary Appeal Form within 20 days after receiving a copy of the MD-2. Your appeal must specifically allege that: (1) required disciplinary procedures were not followed; (2) there was not some evidence to support the Hearing Officer findings; or (3) the disciplinary sanctions were clearly excessive.
3. Minor offenses do not require a due process hearing or an appeals process.
4. Based on the findings of the Disciplinary Hearing Officer you may be assessed all, part or none of the total restitution amount as listed above.

INSTRUCTIONS FOR SERVING OFFICER

1. Hand the offender one copy of the MD-1 with a damage report if restitution is requested.
2. Enter the date served in O-track.

Officer Certifying Personal Service	Date and Time Served
Ronald Wilson	03/30/2015 08:05

Addendum 4

Summary Judgment Ruling, Pg. 3, number 9

5. On May 6, 2015, the prison conducted a disciplinary hearing on all three charges contained in the two MD-1 Forms ("the May 6 Hearing").

6. Petitioner claims that he requested to call witnesses at the May 6 Hearing, and to have the hearing officer review video recordings of the pill line from the relevant dates. Petitioner also claims that he requested to review, prior to the May 6 Hearing, certain "written reports" that formed the basis for the charges. According to Petitioner, the hearing officer refused to allow Petitioner to call any witnesses, refused to view video recordings of the pill line, and did not allow Petitioner access to the written reports.

7. Petitioner never identifies any witness by name that he planned on calling at the May 6 Hearing. Instead, he states in his opposition to Respondent's Motion for Summary Judgment that he "told [the hearing officer] to pick anyone, and as many as he wanted, anyone that had received pills at Lone Peak pill line during the time [Petitioner] was there." Petitioner's only disclosed reason for wanting to call witnesses was to have them "testify to not having to show ID before receiving medication."

8. On May 8, 2015, the hearing officer released his Disciplinary Findings from the May 6 Hearing. The hearing officer dismissed without prejudice the two charges related to the March 6 incident "based on incomplete documentation and procedural reasons." He found Petitioner guilty of the charge related to the positive drug test and assessed as punishment 30 days in isolation and a $50 fine.

9. Nowhere does the hearing officer explain his decision to not allow Petitioner to call witnesses, present video recordings, or review the written reports.

Addendum 5

65(B) Petition, Exhibit 16, EX-16,A.

EX-16, A

Utah Department of Corrections

Incident Case # 299839
UDC Discipline Case # 692227

DISCIPLINARY MD-1 FORM Class MAJOR

Last Name	First	Middle	Offender # / USP #
ANDERSEN	KURTIS	ROSS	23131 / 42747

Date and Time Occurred	Incident Location
03/06/2015 18:39 to 07/10/2015 12:05	LONE PEAK - Lone Peak Correctional Facility Medical Room

EXPLAIN CHARGES

B08 INTERFERE W/INVSTGTN,FALSE STATEMENTS/ID

When asked by EMT Mook, an employee of the Dept. of Corrections, if he was Jason Lynn Anderson, he told him that his name was Jason Lynn Anderson. Inmate Kurtis Andersen did tell EMT Mook, and employee of the Dept. of Corrections, that he was Jason Last updated - 07/10/2015

A13 INTOXICANT/CONTROLLED SUBSTANCE

Inmate Andersen, Kurtis 23131 pretended to be inmate Anderson, Jason Lynn 130870 in oreder to obtain the medications prescribed for Anderson, Jason. During pill line at Lone Peak, Inmate Andersen, Kurtis received the pills from the medical retained blister pack of Anderson, Jason from Med Tech Mark Mook after affirming that he was Anderson, Jason. EMT Mook confirmed that Kurtis Andersen did receive the pills prescribed to Jason Anderson as verified in the Demers supplemental report. Last updated - 07/10/2015

Reporting Officer	Electronic Verification	Date
RONALD WILSON	Ronald Wilson	07/10/2015

☐ Restitution Requested From Damage Report	Amount	NOTICE: OTHER RESTITUTION MAY BE ASSESSED WHICH WAS NOT CALCULATED PRIOR TO YOUR HEARING.

Screening Supervisor	Electronic Verification	Date
ROBERT POWELL	Robert Powell	07/13/2015

INSTRUCTIONS FOR OFFENDERS CHARGED WITH MAJOR DISCIPLINARY OFFENSES

1. You have been charged with a violation of rules, regulations or other conduct standards.
2. Major violations entitle you to a due process hearing.
   a. Your case will be heard by a Hearing Officer no sooner than 24 hours after service unless waived.
   b. You are not entitled to an attorney. The Hearing Officer can provide a counsel substitute for offenders found incompetent to offer a defense.
   c. You may request to call witnesses who can offer relevant material, competent testimony. The Hearing Officer will rule on the witness request.
   d. You do not have the right to cross-examine adverse witnesses nor confront accusers if, in the opinion of the Hearing Officer, it would jeopardize the safety of other offenders or staff, security or operational goals. For the same reason, the Hearing Officer may determine it necessary to take some testimony outside your presence.
   e. You may be compelled to answer questions at the hearing. Failure to answer may result in the Hearing Officer making an adverse inference from your silence. If criminal charges are contemplated, you will be notified.
   f. If you wish to appeal the decision in this matter, you may do so by completing the Disciplinary Appeal Form within 20 days after receiving a copy of the MD-2. Your appeal must specifically allege that: (1) required disciplinary procedures were not followed; (2) there was not some evidence to support the Hearing Officer findings; or (3) the disciplinary sanctions were clearly excessive.
3. Minor offenses do not require a due process hearing or an appeals process.
4. Based on the findings of the Disciplinary Hearing Officer you may be assessed all, part or none of the total restitution amount as listed above.

INSTRUCTIONS FOR SERVING OFFICER

1. Hand the offender one copy of the MD-1 with a damage report if restitution is requested.
2. Enter the date served in O-track.

Officer Certifying Personal Service	Date and Time Served
	7-23-15 1330

Addendum 6

Memorandum in Support of Petitioners Original 65(B) Petition, Pg.'s 1 and 2, marks 1, 5, 6, and 8

Kurtis Andersen, 23151
Utah State Prison
P.O.Box 250
Draper, Ut. 84020
Pro se

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

KURTIS ANDERSEN, Petitioner, vs. SCOTT CROWTHER, WARDEN, UTAH STATE PRISON, et al., Respondents.	Memorandum in Support of Petitioners Original 65(B) Petition Case #: 150906553 Judge: Ryan M. Harris

Petitioner Kurtis Andersen, Pro se, submits this memorandum in support of his 65(B) Petition, as additional evidence and information has come to him that is part of and supports the contents of the original petition. Petitioner asks the court to accept the contents of this memorandum and add it to the original petition thereby giving a more complete and accurate picture of the activities of the Department of Corrections. (D.O.C.)

1 – Petitioner had a disciplinary hearing on a re-worded, re-filed write-up that was originally dismissed, on Aug. 28, 2015.

2 – Petitioner received the MD-2 decision form on Sept. 18, 2015. See Exhibit EX-21, A.

3 – At the hearing I presented the exact testimony found in the Additional History Section of the 65(B) petition, page 3-5, paragraphs 6-8. I actually read from it to DHO, officer Young.

4 — Disciplinary Officier Young comitted the exact same violations as he did in the first write-up; Due process violations and deliberate indifference violations, as listed in the Claims for Relief section, paragraphs 1, 3, 5.

5 — No asked for witnesses or witness testimonies were allowed. Again.

6 — No asked for camera evidence allowed, again. Wording in the MD-2 decision form says no 'available' camera evidence. That doesn't mean camera evidence doesn't exist and could have been viewed with a little effort.

7 — No mention of the med-tech's violation of not requiring I.D. of Inmates before distributing medicine, again.

8 — Petitioner was not allowed to view written records of Jason Anderson's medicine distribution history. Again being demed the chance to know the evidence used against him with the subsequent denial of the chance to respond. DHO Young used only a part of Jason's medicine records. He used a rate of pill usage in the blister pack, which is only 15 days worth, which also had medication left over in it, because I was moved on Mar. 11, 2015. The true accounting of what happened with the rate of pill usage, and the changes that occured in that rate, can be determined only with a review of the day-by-day, pill-by-pill distribution of the time frame of before, during, and after I started receiving that medicine. That would be a review of from Dec., 2014, through April, 2015. That would give the true account of the changes. I specifically asked DHO Young to examine that time frame. He did not. Again, see EX-21, A.

— The pharmacy reporting that there was still medication in the blister pack and that the 'amount of medication left over was not recorded in the compvter' is a violation of how to account for and properly dispose of, all un-used and/or returned surplus medications.

Addendum 7

Memorandum In Support of Petitioners Original 65(B) Petition, Exhibit EX21, A

Utah Department of Corrections

Incident Case # 299839

DISCIPLINARY FINDINGS FORM MD-2 Hearing Type: ORIGINAL HEARING

UDC Discipline Case # 692227

Name ANDERSEN, KURTIS ROSS Offender # 23131 USP # 42747

Hearing Date and Time 08/28/2015 07:08 Hearing Location OQUIRRH 4

	Charges	Pleas	Findings	Amended To	Pleas	Findings
1.	B08	NOT GUILTY	GUILTY			
2.	A13	NOT GUILTY	GUILTY			

Findings:

I find Kurtis Andersen guilty of A13 Intoxicant/Controlled Substance and guilty of B08 Interfere w/Investigation, False Statements/ID based on the following:

According to Medical Technician Mook and Officer Demers at pill line on the date of the incident, Inmate Kurtis Andersen was asked if he was Jason Anderson to which he replied that he was Jason Anderson. By stating that he was Inmate Jason Anderson, Inmate Kurtis Andersen was able to receive Jason's prescribed medication. Inmate aren't allowed to possess other inmates prescribed medication or medication in general. I find this to be "some evidence" of his guilt.

Inmate Kurtis Andersen disputes that he told the staff that we was Jason Anderson. He also contends that he was just given the medication when he went to pill line and told them he name was "Anderson". There was no available camera recording of pill line made by Security Electronics Staff, Lone Peak staff or by anyone if the Shift Commander's Office.

The rate of pill usage of Jason's medication according to Pharmacy staff was at the normal rate or slower as it was turned in on schedule with minor deviation but it was noted that there was still medication in the blister pack. The amount of medication that was left over was not recorded in the computer according to the Pharmacy.

Inmate Kurtis Andersen presented information from Med Tech Mook's medical entry that he tested positive for Neurotins which isn't possible. This was verified but it doesn't invalidate the information in this report.

Based on the above findings I assess:

30 DAYS PUNITIVE ISOLATION 09/21/2015 TO 10/21/2015
$100.00 FINE

Hearing Officer	Electronic Verification	Date
Bruce Young	*Bruce Young*	09/14/2015

Addendum 8

Verified Declaration; Letter of Permission

8

I, Jason Anderson, hereby give Kurtis Anderson, #23131, permission to use my medical medicine distribution record history, from December 1st, 2014, to April 1st 2015. Distribution history to be used in legal proceedings only. I Release those records to him effective immediately.

Dated this 16 day of [illegible] 2016.

Jason Anderson,
#130970

NOTARY: RALPH D. BRODE

COMMISSION EXPIRES: [illegible] 16,

RALPH D. BRODE
NOTARY PUBLIC STATE OF IDAHO
COMM # 57361
COMM EXP. 05-10-2016

Addendum 9

Motion to Compel Discovery From Defendants,

pg. 3, number 6.

9

Name/Number: Kurtis Andersen, 23131
Attorney Pro Se
Utah State Prison
P.O. Box 250
Draper, UT 84020

IN THE Third DISTRICT COURT, Salt Lake COUNTY
Judicial DISTRICT/DIVISION

Kurtis Andersen, Plaintiff,

vs.

Scott Crowther, Warden, Utah State Prison, et al, Defendants.

MOTION FOR To Compel Discovery From Defendants!

Case No: 150906553

Honorable Ryan M. Harris

COMES NOW Kurtis Andersen, attorney pro se, and hereby moves this Honorable Court to: enjoin Defendants to produce the requested Discovery items, or verified documentation of the destruction of any or all of the requested items, and answer the requested interrogatory questions.

The reason for this request is:

- Petitioner has been unable, despite repeated [redacted] requests, to get Defendants to comply or even respond, to date.
- Petitioner asks for the Courts permission to exceed the four (4) page limit on a Compel to Discover Motion. The reason being handwritten documents take up alot more space than do ones produced in a computer.

[redacted]

Attorney Pro Se

1. Petitioner respectfully requests the Court to enjoin Defendant to produce the requested discovery items and to answer the submitted interrogatories. See attached.
2. Petitioner respectfully asks the Court to enter and order that if in fact the Defendant tries to claim that the Camera coverage evidence has been destroyed, they produce a verification of that, under Oath, by the only Officier responsible for <u>all</u> Utah State Prison records, Scott Crowther, Warden. Said verification to include documentation of the destruction, the person who authorized the destruction and the date, time, location and method of that destruction. Petitioner has reminded Defendant that when something exists, like Camera footage, it stays existing until it is destroyed. Petitioner has requested documentation that the evidence was in fact <u>destroyed</u> but have not recewed any, to date.
3. Petitioner has failed to date to get any response from Defendant for the original discovery requests, March 21, 2016, the original interrogatory request, April 14, 2016. There also has been no response concerning Petitioners second request for both concerns, May 9, 2016. See attached.
4. Petitioner has also failed in his attempts through the Administrative process of the Utah State Prison. These attempts date back to May 6, 2015. Copies of these attempts are in the 65(B) Petition and other motions on file with the Court.
5. These are all lawful requests under Utah Rules of Civil Procedures, Rule 26. Defendants have 'failed to disclose under Rule <u>26</u>', Rule 37(a)(1)(A); and have 'failed to make full and complete discovery,' Rule 37(a)(1)(E).

6 Petitioner respectfully requests the Court to enjoin the Defendant to provide Petitioner access to the other Anderson, Inmate Jason Anderson, #130870, so as to ask for his permission to use his medication distribution history, that part only, of his medical record, in support of his Petition.

Petitioner asks that this be in person, or that the Court appoint an Attorney, or have a neutral third party appointed to do this.

7 Petitioner respectfully asks the Court to enjoin all employee's of the Utah State Prison to refrain from any communication with Jason Anderson concerning this matter. This to protect him from intimidation and threats concerning this issue.

8 Petitioner has no ability to personally ask Jason at this time as he is housed in another area of the prison, and, Petitioner has once again been stripped of all privileges, which includes being locked-down at 9:00 A.M., no phone and no visits.

9 Petitioner respectfully asks the Court to compel the Defendent to produce the policy concerning how long they are required to save documents, including Camera [redacted] recordings, disciplinary actions and reports, medical records, and any and all other documents produced by the Utah State Prison. Petitioner has asked the Contract Attorneys' to [redacted] provide a copy of this document and was told it is an internal matter with the prison and has no authority to provide it to the Petitioner. That response was given to the Court with the letter sent to the Court on May 9, 2016 and so I do not have it to submit with this matter.

Petitioner has put in two Grama requests for the information, both have gone unanswered. They have not returned them with the answers as they are required to so I don't have copies

Addendum 10

Summary Judgment Ruling, Pg- 12, footnote 7.

these reasons, the brief suspension of Petitioner's medication does not constitute "deliberate indifference" as a matter of law.

CONCLUSION

Based on the foregoing, the Court concludes that each of Petitioner's claims for relief fail as a matter of law. Accordingly, Respondent's Motion for Summary Judgment is GRANTED.[7] The Petition is hereby DISMISSED, with prejudice and on the merits. This Ruling and Order is the order of the Court with regard to the Motion. Respondent is invited to prepare a separate Judgment as set forth by Utah R. Civ. P. 58A(a).

DATED this 8th day of June, 2016.

RYAN M. HARRIS
District Court Judge

[7] While the Motion for Summary Judgment was pending, Petitioner filed and submitted for decision a Motion to Compel Discovery from Defendants. Petitioner fails to identify any specific discovery that was not provided that would have been material to his claims or to his defense of the Motion for Summary Judgment. Accordingly, the motion to compel is respectfully DENIED.

Addendum 11

Phelps Declaration, Pg. 2, number 11

SHAREL S. REBER (#7966)
Assistant Attorney General
SEAN D. REYES (#7969)
Attorney General
Attorneys for Respondents,
PO Box 140812
160 East 300 South
Salt Lake City, Utah 84114-0812
Telephone: (801) 366-0216

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

KURTIS ANDERSEN, **Petitioner,** **vs.** **SCOTT CROWTHER, Warden, Utah State Prison, UTAH STATE PRISON, et al.,** **Respondents.**	**DECLARATION OF JAY PHELPS** **Case No. 150906553** **Honorable Ryan M. Harris**

I, JAY PHELPS, make the following statements based upon my own personal knowledge.

1. I am an adult resident of the United States of America and the State of Utah, and I am over the age of eighteen years.
2. I am competent to testify as to the matters stated herein, and base these statements on personal knowledge
3. I am presently employed by the Utah Department of Corrections (Department) as an

Electronic Tech/Journeyman Officer. In this position, I work for the Security Electronics Department at the Utah State Prison, maintaining security, telephone, camera, fire alarm, and mobile radio systems.

4. I have occupied this position since February of 2007.

5. I have been employed with the Department since 2006, when I was hired as a Journeyman Electrician/Correctional Officer. I was promoted to my present position in February of 2007.

6. I have reviewed the video recordings for the Lone Peak, Oquirrh 2, and Oquirrh 4 housing units at the Utah State Prison.

7. Lone Peak has 36 cameras on an Advent DVR, which stores the video recordings for 15 days.

8. Oquirrh 2 has 26 cameras on a Pelco DVR, which stores the video recordings for 18 days.

9. Oquirrh 4 has 23 cameras on a Pelco DVR, which stores the video recordings for 18 days.

10. None of the video recordings in any of these housing units have audio recording.

11. There are presently no video recordings from Lone Peak for the time frame of January 25, 2015 to March 15, 2015, or from the time frame of April 30, 2015 to May 30, 2015.

12. There are presently no video recordings from any of the Oquirrh 2 housing sections for the time frame of March 20, 2015 to April 20, 2015, or for the time frame of May 1, 2015 to July 15, 2015.

13. There are presently no video recordings from any of the Oquirrh 4 housing sections for the time frame of September 20, 2015 to September 30, 2015.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on this 9 day of February, 2016.

JAY PHELPS

Addendum 12

Summary Judgment Ruling, Pg. 5, number 19

Petitioner, the hearing officer again refused to allow Petitioner to call witnesses or to view any video recordings.

17. On September 14, 2015, the hearing officer issued his Disciplinary Findings from the August 28 Hearing. The hearing officer found Petitioner guilty of both charges, and assessed as punishment 30 days in isolation and a $100 fine. The Disciplinary Findings indicate that the hearing officer relied on statements from Medical Technician Mook and Officer Demers, as well as a review of the other inmate's "rate of pill usage."

18. The Disciplinary Findings from the August 28 Hearing state that "[t]here was no available camera recording of pill line made by Security Electronics Staff, Lone Peak staff or by anyone if [sic] the Shift Commander's Office."

19. Jay Phelps, an Electronic Tech/Journeyman Officer at the Utah State Prison, testified that none of the video cameras that might have recorded footage of the pill line have audio recording. He also testified that the video recordings from these cameras are stored for no more than 18 days and that no recordings presently exist from the subject dates.

20. On September 14, 2015, Petitioner initiated the instant action, alleging that the prison failed to afford him due process at his disciplinary hearings and violated his rights under the Eighth Amendment.

21. Petitioner filed a flurry of motions at the outset of the case, which the Court resolved in a Ruling and Order entered April 18, 2016.

22. Respondent now seeks summary judgment on Petitioner's claims.

STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(a). When considering a motion for summary judgment, the trial court should not weigh evidence and must construe all reasonable inferences in favor of the nonmoving party. Pigs Gun Club,

Addendum 13

Summary Judgment Ruling, DISCUSSION Section,

Pg. 7

13

> his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Additionally, the minimum requirements of procedural due process demand that the findings of the prison disciplinary board are supported by some evidence in the record.

Todd v. Sorensen, 2015 UT App 87, ¶ 2, 348 P.3d 350 (internal citations and quotations omitted).

Here, Petitioner in his two hearings was afforded sufficient due process protections to comply with constitutional requirements. First, although inmates have a qualified right to call witnesses at disciplinary hearings, see Edwards v. Balisok, 520 U.S. 641, 646 (1997) (stating that a due process violation may occur where an inmate is not allowed to present "specifically identified witnesses who possess[] exculpatory evidence"), Petitioner failed to identify by name—either in his Petition or in response to the pending Motion for Summary Judgment—any particular witness that he was prevented from calling at either disciplinary hearing. Moreover, the testimony that he sought to elicit—that the prison did not require inmate IDs in order to obtain medicine in the pill line—would have had no bearing on the disciplinary proceedings, because this fact was not in dispute. Indeed, the hearing officer's Disciplinary Findings from the August 28 Hearing make clear that he already understood that no ID was required in the pill line.[4] Thus, the only disclosed issue on which Petitioner wanted to have witnesses testify was not in dispute at the disciplinary hearings and, therefore, the testimony would have been cumulative and unnecessary. Accordingly, the hearing officer's decision to decline Petitioner's invitation to call witnesses did not deprive Petitioner of due process.[5] Cf. Ramer v. Kerby, 936

[4] The hearing officer found as the basis for his decision that Petitioner "was asked if he was [redacted] Anderson to which he replied that he was [redacted] Anderson." Obviously, if an ID had been required, there would have been no need for the medical technician to ask Petitioner his name.

[5] The record does not contain the hearing officer's exact reason for not allowing Petitioner to call witnesses at the disciplinary hearings. However, according to the United States Supreme Court, disclosure of the reason for a denial is not imperative. See Wolf, 418 U.S. 539, 566 (stating that although it would be "useful" for the hearing tribunal to "state its reason for refusing to call a witness," the Court expressly "[did] not prescribe it"). Here, the hearing officer's reason appears evident from the record before the Court, and Petitioner has failed to demonstrate—or even allege—how the requested testimony would have been at all useful to his defense against the charges.

Addendum 14

Letter to Defendants Counsel

14

Letter of Notice Petitioner will Appeal

To Sharel S. Reber, Counsel for Defendants in Case # 150906553.

I hope this finds you well. This letter is to notify you that I am pursuing further Court action on this matter. This will include a motion for relief from Judgment, Rule 60, and an appeal in the Utah Appellate Court. So having been notified, I believe under Utah law that you are obligated to continue to preserve all evidence and items that could be used in the proceedings. Be advised. As their Counsel, please notify the prison personnel of their obligations. I have sent a copy of this letter to Mike Haddon, Deputy Director, UDC, and to the Court.

Thank you for your time.

Dated this 22 day of June, 2016.

Kurtis Andersen

Kurtis Andersen
pro se

Addendum 15

Howard V. U.S. Bureau of Prisons

15

487 F.3d 808 (2007)

Clinton HOWARD, Petitioner-Appellant,

v.

UNITED STATES BUREAU OF PRISONS, Respondent-Appellee.

No. 06-3315.

United States Court of Appeals, Tenth Circuit.

May 23, 2007.

809 *809 Submitted on the briefs:[*]

Clinton Howard, pro se.

Eric F. Melgren, United States Attorney, and D. Brad Bailey, Assistant United States Attorney, District of Kansas, for Respondent-Appellee.

Before HARTZ, EBEL, and TYMKOVICH, Circuit Judges.

EBEL, Circuit Judge.

Petitioner Clinton Howard, a federal inmate proceeding *pro se,* appeals the dismissal of his petition for a writ of habeas
810 *810 corpus brought pursuant to 28 U.S.C. § 2241.[1] He argues that, during two disciplinary proceedings against him for assaulting another prisoner and possessing drug paraphernalia, officials of the federal penitentiary in Florence, Colorado, violated his due process rights. Because Mr. Howard was denied the opportunity to present potentially exculpatory evidence at one of his hearings, we AFFIRM in part and VACATE and REMAND in part.

I. Facts

On December 9, 2001, Clinton Howard, an inmate at the United States Penitentiary in Florence, Colorado ("USP — Florence"), under the supervision of the United States Bureau of Prisons ("the Bureau"), was involved in a fight with another inmate ("Inmate X"). According to the observations of Officers Hash and Sams, who witnessed at least the denouement of the altercation, Mr. Howard was chasing "Inmate X" in the prison yard and threw a homemade weapon at him but missed. "Inmate X" then picked up the weapon and struck Mr. Howard with it. Responding officers quickly separated the inmates, restrained them, and recovered the weapon, an ice pick. Mr. Howard was placed in administrative detention in the Special Housing Unit ("SHU") pending an investigation of the incident. An incident report, Incident No. 945214, was filed by Officer Hash on December 10 charging Mr. Howard with violating Bureau Codes 101A (Attempted Assault) and 104 (Possession of a Weapon).

While Mr. Howard was in administrative detention, Officer Ford conducted a routine inventory shakedown of Howard's belongings on December 11, 2001. Officer Ford discovered a hypodermic needle and syringe secreted among Mr. Howard's legal papers. He filed an incident report, Incident No. 945874, charging Mr. Howard with violating Bureau Code 113 (Possession of Drug Related Paraphernalia).

Mr. Howard appeared before the Unit Disciplinary Committee ("UDC") on both charges at separate hearings on December 18 and 26, 2001. At the hearing on Incident No. 945214, Mr. Howard denied the assault and weapon possession charges and asked that prison officials review videotape records from a camera that he alleged captured the incident. At the hearing on Incident No. 945874, Mr. Howard denied possessing the syringe and argued that, while he was detained in SHU, other inmates had had access to his belongings. In both cases, the UDC referred the charges to a disciplinary hearing officer ("DHO") for further hearing. Mr. Howard was provided with written notice of this DHO hearing

and responded, requesting the attendance of three staff witnesses: Officer Sams; Lieutenant Cunningham, the staff supervisor on duty on December 9; and P.A. Santos, who treated Mr. Howard and "Inmate X" for injuries received during the fight.

At a consolidated hearing on the two incidents on February 15, 2002, Mr. Howard denied all violations and repeated his
811 previously asserted defenses to the charges.[2] Mr. Howard's requested witnesses *811 did not appear, but they each submitted a written statement which was considered by the DHO. The DHO refused to consider the videotape evidence that Mr. Howard alleged would exonerate him. Relying on statements by Officers Hash and Ford, other reporting staff members' statements, other supporting documentation, and Mr. Howard's denial, the DHO found Mr. Howard had violated Bureau Codes 224 (Assaulting Another Person), 104 (Possession of a Weapon), and 113 (Possession of Drug Related Paraphernalia). As a result of the charges from each incident, the DHO disallowed previously accumulated good-time credit, recommended disciplinary segregation and a disciplinary transfer, suspended various privileges, and impounded Mr. Howard's personal property. Mr. Howard was subsequently transfered to the United States Penitentiary at Leavenworth, Kansas ("USP — Leavenworth").

Mr. Howard unsuccessfully pursued and exhausted the administrative appeals open to him for both incidents. He then filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the District of Kansas. Following submissions by both parties, the district court dismissed the petition, and Mr. Howard filed this timely appeal.

II. Jurisdiction

Mr. Howard argues on appeal that the District of Kansas lacked jurisdiction over his petition because the underlying events took place at USP — Florence. Although Mr. Howard did not raise this argument below, we must address it briefly as a predicate to our exercise of jurisdiction. In this instance, the district court's jurisdiction over this petition is plain. "A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined." *Haugh v. Booker*, 210 F.3d 1147, 1149 (10th Cir. 2000) (quoting *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir.1996)). Because Mr. Howard was imprisoned in USP — Leavenworth when he filed his petition, the District Court for the District of Kansas properly exercised jurisdiction over his petition. Further, we have jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

III. Due Process Claims

Mr. Howard advances three claims before this court. First, he argues that the evidence was insufficient to support the discipline meted out for possession of drug paraphernalia. Second, he contends he was denied due process when the DHO refused to permit Mr. Howard's requested witnesses to testify in person. And finally, he claims the DHO's refusal to produce and review a videotape of the alleged assault constitutes a separate violation of his due process rights. The district court dismissed each of these claims, and we review its conclusions of law de novo. *Wilson v. Jones*, 430 F.3d 1113, 1117 (10th Cir.2005).

"It is well settled `that an inmate's liberty interest in his earned good time credits cannot be denied without the minimal safeguards afforded by the Due Process Clause of the Fourteenth Amendment.'" *Mitchell v. Maynard*, 80 F.3d 1433, 1444
812 (10th Cir.1996) (quoting *Taylor v. Wallace*, 931 F.2d 698, 700 (10th Cir.1991)). However, *812 "[p]rison disciplinary disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

> Where a prison disciplinary hearing may result in the loss of good time credits,... the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). Further, "revocation

of good time does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record." *Id.* (citation, quotation omitted).

A. Evidence of Possession of Drug Paraphernalia (Incident No. 945874)

"Ascertaining whether [the "some evidence"] standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455-56, 105 S.Ct. 2768. A disciplinary board's decision can be upheld by a reviewing court "even if the evidence supporting the decision is `meager.'" *Mitchell*, 80 F.3d at 1445 (quoting *Hill*, 472 U.S. at 457, 105 S.Ct. 2768).

Mr. Howard's conclusory arguments to the contrary, the evidence supporting his disciplinary sentence for possession of drug paraphernalia easily meets the *Hill* standard. It is indisputable that Mr. Howard, who had been placed in administrative detention at the time of Officer Ford's inventory shakedown of his possessions, did not have actual possession of the hypodermic syringe Officer Ford discovered. However, Officer Ford's incident report indicates the contraband was found among Mr. Howard's legal papers confiscated during the time of his detention, and this is "some evidence" sufficient to support the disciplinary sentence on a theory of constructive possession. *Cf.* *Hamilton v. O'Leary*, 976 F.2d 341, 345 (7th Cir. 1992) ("The proposition that constructive possession provides `some evidence' of guilt when contraband is found where only a few inmates have access is unproblematical.") Mr. Howard's loss of good-time credits for this infraction thus did not violate his due process rights.

B. Exclusion of Live Witness Testimony (Incident No. 945214)

"Chief among the due process minima outlined in *Wolff* was the right of an inmate to call and present witnesses and documentary evidence in his defense...." *Ponte v. Real*, 471 U.S. 491, 495, 105 S.Ct. 2192, 85 L.Ed.2d 553 (1985). But this right is not absolute; rather it is "circumscribed by the necessary `mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" *Baxter v. Palmigiano*, 425 U.S. 308, 321, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) (quoting *Wolff*, 418 U.S. at 556, 94 S.Ct. 2963). Because of the "greater hazards to institutional interests" posed by confrontation and cross-examination, "there is no general right to confront
813 and *813 cross-examine adverse witnesses" in the context of prison disciplinary proceedings. *Id.* at 321, 322 n. 5, 96 S.Ct. 1551 (citation omitted). And while prison officials must consider an inmate's request "to call or confront a particular witness ... on an individualized basis," *Ramer v. Kerby*, 936 F.2d 1102, 1105 (10th Cir.1991), "errors made by prison officials in denying witness testimony at official hearings are subject to harmless error review," *Grossman v. Bruce*, 447 F.3d 801, 805 (10th Cir.2006).

Mr. Howard requested the testimony of three witnesses at his hearing before the DHO: Officer Sams, Lieutenant Cunningham, and P.A. Santos. While none of the three testified in person, each submitted written statements. Mr. Howard contends that the testimony of Officer Sams, who witnessed part of the incident, was necessary to his defense. In his write-up of the incident, Sams stated that he "saw what appeared to be a homemade weapon throne [sic] by an unknown person towards [Inmate X]. [Inmate X] then picked up the homemade weapon[.] Using the weapon [Inmate X] started after inmate Howard ... striking him in the upper torso and head area."

This testimony is entirely consistent with that provided by Officer Hash, who wrote the incident report on which the DHO's findings relied. Officer Hash reported seeing Mr. Howard "chasing [Inmate X] ... with [a] homemade weapon. Inmate Howard attempted to assault [Inmate X] by throwing the weapon at [Inmate X and] missing him." In a separate memo, Officer Hash had previously stated that, after Mr. Howard threw the weapon, "[Inmate X] then picked up the weapon and started after inmate Howard."

The abbreviated description provided in Officer Sams's written statement does not conflict with the events as reported by Officer Hash. Although Mr. Howard argues that Officer Sams's statement was ambiguous, he has not demonstrated how further testimony would have aided his defense. As such, Mr. Howard was not prejudiced, and any error in excluding

Officer Sams from testifying in person was harmless. *See* Grossman, 447 F.3d at 805.

C. Exclusion of Videotape Evidence (Incident No. 945214)

In *Wolff,* the Supreme Court drew no distinction between the standard prison officials may use to refuse requests by an inmate to introduce documentary evidence and that applying to requests to present witness testimony: "the inmate ... should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566, 94 S.Ct. 2963. And, as with a prisoner's request to call a particular witness, prison officials are required to consider a request for documentary evidence on an individualized basis. *See* Grossman, 447 F.3d at 805.

In addition to his requested witness testimony, Mr. Howard requested that the DHO review videotape records from a camera which was allegedly sited atop a neighboring building.[3] This plea merely reiterated a request Mr. Howard had
814 consistently made before, one he clearly expected would bolster his argument that he acted in self-defense. The *814 Bureau has never asserted, and the record before us does not support, a conclusion that producing the videotape alleged by Mr. Howard to have recorded the incident would be "unduly hazardous to institutional safety or correctional goals." *Wolff,* 418 U.S. at 566, 94 S.Ct. 2963. The DHO's unjustified refusal to produce and review it deprived Mr. Howard of the process due him.

The Bureau, responding to the district court's show-cause order, raised two arguments. It asserted, first, that Mr. Howard had failed to demonstrate that any videotape documenting the incident existed and, second, that in any event its presentation would be "needlessly cumulative." As to the Bureau's first point, we note both that the Bureau has carefully refrained from denying that any videotape exists and that the proof of this point is solely within its control. We are unconvinced, given Mr. Howard's specific allegations of self-defense and exculpatory videotape evidence in the government's exclusive possession, that Mr. Howard failed to carry whatever burden he may have had at that stage of the proceedings.[4]

We find the second point equally unavailing. The Bureau noted that the DHO based his decision on staff reports, and argued that, because "[p]rison staff are legally obligated to tell the truth in disciplinary proceedings," introducing "any *possible* videotape would have been needlessly cumulative." This Orwellian argument would neatly dispose of any need to allow inmates to present evidence contradicting statements of prison staff, a conclusion we are not prepared to accept. *See* Ramer, 936 F.2d at 1104 ("[A]n assertion that a witness' testimony is `merely corroborative' generally is insufficient to justify denial of an inmate's request to call witnesses when that inmate faces a credibility problem trying to disprove the charges of a prison guard." (citation omitted)). Moreover, the DHO could not possibly have known the videotape was needlessly cumulative without looking at it. We do not question the truthfulness of the testimony provided by Officers Sams and Hash when we note that neither may have witnessed the entire incident, and the critical facts of Mr. Howard's asserted defense may have been recorded by the videotape before either officer arrived on the scene. On neither ground advanced by the Bureau, then, can we agree that the refusal to produce and review the videotape at Mr. Howard's hearing before the DHO would have been "unduly hazardous to institutional safety or correctional goals." *Wolff,* 418 U.S. at 566, 94 S.Ct. 2963.

The Bureau does not argue, nor are we prepared to say on the record before us, that the DHO's refusal to review the
815 videotape was harmless.[5] It is plain that, if Mr. *815 Howard is correct, the videotape would not have been "needlessly cumulative" but would rather have constituted significant, perhaps conclusive, evidence that might exonerate him of the acts charged against him. Rather, liberally construing Mr. Howard's allegations as we must for *pro se* plaintiffs, Garcia v. Lemaster, 439 F.3d 1215, 1217 (10th Cir.2006), Mr. Howard has successfully alleged that the DHO's refusal to produce and review the videotape prejudiced him based on his allegations that the tape would show he acted in self-defense.

IV. Conclusion

Mr. Howard's arguments that his due process rights under *Wolff v. McDonnell* were violated by insufficient evidence to sustain the possession of drug paraphernalia charge in Incident No. 945874 and by the exclusion of witness testimony at his disciplinary hearing concerning Incident No. 945214 are without merit. However, the Bureau's refusal to produce and review a videotape which Mr. Howard asserts would refute charges stemming from Incident No. 945214 violated his due process right to present documentary evidence in his own defense. Accordingly, we AFFIRM the district court's dismissal of Mr. Howard's petition for a writ of habeas corpus as to Incident No. 945874 and VACATE its dismissal of the petition as to Incident No. 945214 and REMAND for consideration whether the violation of Mr. Howard's procedural due process rights was nonetheless harmless error.

[*] After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Because Mr. Howard is a federal prisoner proceeding under 28 U.S.C. § 2241, we note that his appeal is not governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), and thus no certificate of appealability is required. *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 810 n. 1 (10th Cir.1997).

[2] There are two versions of the DHO Report for Incident No. 945214 in the record. The first is dated May 9, 2002, and reflects that Howard did not request any witnesses and admitted his guilt of the weapon possession and assault charges. (Rec. Doc. 8 att. D. at 3.) The second, marked as "Amended," is dated October 4, 2002, and reflects that Howard requested witnesses who were unavailable and denied the charges. (Rec. Doc. 1 ex. D at 1.) No one explains the emendation of the DHO report or why both reports were written so long after the conclusion of the DHO hearing. However, we rely on the Amended DHO Report.

[3] Although the record does not provide conclusive proof that Howard requested production of the tape at the DHO hearing, it provides strong inferential support that he did so. (*See* Rec. Doc. 1 ex. G (Administrative Remedy Response dated 11/01/02) (noting Howard's contention that he was denied review of the videotape); Rec. Doc. 13 at 2 (finding, in the district court below, that Howard did request the tape at the hearing).)

[4] In this connection, we note that at least one other circuit has vigorously enforced a long-standing rule requiring government disclosure of exculpatory evidence in prison disciplinary proceedings, "unless that disclosure would unduly threaten institutional concerns." *Rasheed-Bey v. Duckworth*, 969 F.2d 357, 361 (7th Cir.1992); *see Chavis v. Rowe*, 643 F.2d 1281, 1285-86 (7th Cir.1981) (holding that officials' failure to disclose materially exculpatory evidence in a prison disciplinary proceeding violates the inmate's due process rights and is not harmless error); *see also* 60 AM.JUR. 2d Penal & Corr. Insts. § 143 (noting that "depriving a prisoner [of] an opportunity to present exculpatory evidence" violates due process, citing *Chavis*). We do not, in this case, need to go this far, and so we do not in this case determine whether or not to follow this line of cases.

[5] In its response brief, the Government has advanced the theory that, construing Howard's argument as one arising under *Brady v. Maryland*, any due process violation stemming from its refusal to turn over the videotape was harmless. Its argument in this regard depends on the contention that Howard's admitted conduct "would fit within the prison discipline definitions for possessing a sharpened instrument and/or assault." *See Griffin v. Brooks*, 13 Fed.Appx. 861, 864 (10th Cir.2001) (unpublished) (holding refusal to turn over an allegedly exculpatory videotape was not prejudicial when the theory of exculpation was legally incorrect). The Government, however, misconstrues the nature of Howard's admissions and fails to substantiate its contention that his admitted conduct falls within the ambit of the regulatory language.

Although the Government states that Howard "admitted during the DHO proceedings that he had actually picked up and thrown a sharpened object in the direction of another inmate," this contention is not supported by the record. During the incident investigation, Howard stated that "[t]his fool came up on me with a knife[;] when the fool dropped the knife, I picked it up and threw it at the wall, not even in his direction." (Rec. Doc. 8 att. D at 2 (Incident Report No. 945214).) The summary of Howard's statement at the DHO hearing is far less illuminating: "I was defending myself. I'm not mad with this inmate." (Rec. Doc. 1 ex. D at 1 (Amended DHO Report).)

Absent a demonstration that the admitted conduct shown by the record falls within the legal definitions of possession and assault employed by Bureau Codes 104 and 224 and that on this record Howard has no affirmative defenses available to these charges, we cannot label this constitutional violation harmless on logic similar to that employed in *Griffin*. Instead, we remand to the district court for a determination of harmlessness on a fuller factual record.

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CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, to Utah Court of Appeals, Motion to be excused, Order 8, on this 26 day of October, 2016.

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Foregoing is Appeal, Case #20160676-CA, and Motion to be excused from Standing Order No. 8.

County of Davis)
On this 26 day of Oct, in the year 2016 before me Kevin A. Tucker
a notary public, personally appeared Kurtis Anderson
proved on the basis of satisfactory evidence to be the person(s) whose name(s) (is/are) subscribed to this instrument, and acknowledged (he/she/they) executed the same. Witness my hand and official seal.

NOTARY PUBLIC

SEAL

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Commission Expires
May 27, 2019
State of Utah

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